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No. 04-206

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SL SERVICE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICI CURIAE* OF HORIZON LINES, LLC; AMERICAN OCEAN ENTERPRISES, INC.; AMERICAN ROLL ON ROLL OFF CARRIER, LLC; AMERICAN SHIPPING GROUP; CENTRAL GULF LINES, INC.; MATSON NAVIGATION COMPANY, INC.; TECO OCEAN SHIPPING; THE TRANSPORTATION INSTITUTE; AND WATERMAN STEAMSHIP CORP.

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November 12, 2004

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BRIEF *AMICUS CURIAE*

On written consent of all parties pursuant to Rule 37.3(a), Horizon Lines, LLC, American Ocean Enterprises, Inc., American Roll On Roll Off Carrier, LLC, American Shipping Group, Central Gulf Lines, Inc., Matson Navigation Company, Inc., Teco Ocean Shipping, the Transportation Institute and Waterman Steamship Corp. (the "industry representatives" or "*Amici*") respectfully submit this brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit made by SL Service, Inc.[1]

INTERESTS OF *AMICI CURIAE*

Horizon Lines, LLC ("Horizon") is the nation's leading Jones Act container shipping and logistics company, accounting for approximately 37% of total U.S. marine container shipments from the continental United States to Alaska, Puerto Rico, and Hawaii/Guam, the three major non-contiguous Jones Act markets. Under the Jones Act, 46 U.S.C. App. § 883 (2000), enacted in 1920, domestic U.S.-maritime trade is restricted to U.S.-owners of U.S.-built and flagged vessels manned by predominantly U.S. citizen crews.

Horizon operates the largest Jones Act containership fleet with 16 vessels and approximately 21,700 cargo containers of varying specifications, and provides comprehensive shipping and logistics services in these markets. Typically, 15 of Horizon's vessels are actively deployed at any given time, with one spare vessel reserved for relief while another undergoes U.S. Government-required periodic inspections, generally requiring dry-docking. Having a spare ship

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[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no party or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. *Amici* customs counsel, Williams Mullen, which is also co-counsel for the petitioner, co-authored this brief.

allows Horizon to offer continuity of service, critical to its customers.

All of Horizon's vessels are regulated or classed by the United States Coast Guard ("USCG") and the American Bureau of Shipping ("ABS"), which together impose and enforce rigorous inspection criteria. Horizon's vessels are maintained according to its own strict maintenance guidelines, which meet or exceed U.S. governmental requirements. Horizon's careful maintenance procedures protect and preserve its fleet to the highest standards in the industry.

Horizon has dry-docked 34 vessels since December of 1999. It sends requests for bids along with a detailed specification to a minimum of six shipyards, in the United States as well as foreign shipyards in the vicinity of the vessel's routes. Horizon will often switch ships between services to obtain the most beneficial location and scheduling for the dry-dockings. The present disparity in bid cost and projected completion time between U.S. and foreign shipyards often results in the work being done in foreign shipyards. Horizon has been working with several U.S. yards to reduce those disparities.

American Ocean Enterprises ("AEO") is the parent of American International Car Carrier, Inc. ("AICC"), which operates three U.S.-flag car carrier vessels under time charter to American Roll On Roll Off Carrier, LLC ("ARC"). Operating in foreign commerce between Europe and the U.S. east coast, these ships undergo ship repair in foreign shipyards. The decision in this case thus affects AOE as well as ARC.

American Shipping Group and its subsidiaries are privately held U.S. corporations that own and operate seven U.S.-built, U.S.-flag commercial cargo vessels qualified to operate in Jones Act trades. Currently, two vessels are serving Alaska, two are serving Puerto Rico, one is chartered into service to

Hawaii and two are chartered to the United States military. Several of these vessels have been repaired in foreign shipyards in the past, and any or all of them could be repaired in foreign shipyards in the future.

Central Gulf Lines, Inc. ("Central Gulf") and Waterman Steamship Corp. ("Waterman") are U.S. citizen owned and controlled companies that own and operate numerous U.S.-flag commercial vessels in the foreign trade of the United States. Central Gulf and Waterman strongly oppose the imposition of duties under 19 U.S.C. § 1466 upon dry-docking, general service and other non-vessel repair expenses incurred for work performed on their U.S.-flag vessels that is otherwise required by the U.S. Coast Guard or appropriate vessel classification societies. The onerous duties are not authorized by the statute for such non-repair work, and they adversely affect the competitiveness of Central Gulf, Waterman and other U.S.-flag commercial vessel owners and operators engaged in the U.S. foreign trade.

Matson Navigation Company, Inc. is a Hawaii corporation and is a principal Jones Act carrier in the Hawaii and Guam trades. Matson is a wholly-owned subsidiary of Alexander & Baldwin, Inc., a Hawaii corporation. Matson currently owns or operates 13 ships, four barges and one integrated tug-barge and has also provided rail, highway, air, ocean and other surface transportation and other third-party logistics services for North American shippers. Under its current vessel schedule configuration Matson has deployed nine ships and three barges in the Hawaii trade, one barge in the Mid-Pacific trade, and three ships in the Guam Pacific trade, and two ships are in lay-up. All of the vessels are U.S.-flag vessels, and the ships are manned by U.S. citizen crews. The U.S. Coast Guard administers and regulates the international and flag state requirements for Matson's vessels. ABS is the classification society for all of Matson vessels. Matson's vessels are subject to regular inspection and drydocking as

well as a preventive maintenance program. The vessels periodically undergo repairs and modifications in both U.S. shipyards and foreign facilities. Since 2000, Matson's owned or operated vessels have been repaired, been modified or had scheduled drydockings in foreign shipyards 16 times.

Teco Ocean Shipping ("TOS") operates a fleet of 11 U.S.-flag vessels and ocean-going integrated tug and barge units ranging in size from 19,200 deadweight ton ("dwt") to over 40,000 dwt. TOS has been in business with U.S.-flag vessels since 1959 and is primarily in the dry bulk coastwise trades of the United States. TOS regularly drydocks in Asia, the Mediterranean and Latin America and will continue to do so into the foreseeable future.

The Transportation Institute is a Washington, D.C.-based non-profit organization dedicated to maritime research, education and promotion. The Institute supports a wide range of programs that promote the strength of America's marine transportation capability.

STATEMENT

Required Regulatory Inspections

U.S. flag commercial vessel operators are subject to numerous regulations, the most important of which are USCG and ABS.[2] These bodies have been regulating, by rule and by on-site inspection, the design specifics, construction and on-going operation and testing of *Amici's* vessels. Non-compliance with USCG and ABS rules and regulations would

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[2] U.S. flag vessels are required to undergo regular inspections by the USCG and ABS. See 46 C.F.R. §§ 2.01-10(b), 90.05-1(a), 91.01-1 (Oct. 1, 2003). According to U.S. Coast Guard regulations, these inspections must occur at least two times in a five-year period, with no more than three years elapsing between any two examinations. *See id.* § 91.40-3 (Oct. 1, 2003). This usually requires dry-docking of the vessel, taking the vessel out of service for two weeks or more. *Id.*

result in the vessel not being able to operate. USCG compliance is required by law. ABS compliance is necessary to obtain insurance.

The on-site inspection/survey, as was involved with the SEA-LAND PACIFIC in this case, would normally require vessels owned or operated by *Amici* to be put in dry-dock for a thorough inspection of the entire exterior hull, rudders, anchors and propeller shafts, most of which can be inspected only when the vessel is high and dry. Additional inspections always done at the time of dry-dock include internal inspections of major components in the propulsion system such as propulsion boilers, propulsion turbines, condensers for the propulsion steam, etc. These inspections are performed coincidentally with USCG and ABS inspections while the ship is in dry-dock since the propulsion plant cannot be run while in dry-dock. The dry-dock period provides the time to inspect the internals of these units.

By way of example, USCG attends approximately 10 percent of Horizon Lines' vessels' inspections because Horizon uses the optional Alternate Compliance Program. Under this program, USCG has delegated much of its inspection authority to the ABS to save USCG time and to reduce duplication of inspections. ABS inspections almost always take place while the ship is in dry-dock. Most major shipyards have provided offices to ABS inspectors/surveyors to make on-site inspection more efficient for ABS as well as the ship operators.

Because of the high cost of dry-docking a large cargo ship and the substantial cost in having a ship out of service, most ship owners or operators will arrange for necessary non-emergency repairs and modifications to be performed at the same time when the ship is in dry-dock for USCG and ABS inspections.

The Vessel Repair Statute

The federal vessel repair statute imposes a 50 percent duty on the cost of repairs made in foreign countries on U.S.-flag vessels. The statute provides in pertinent part that

> . . . the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade . . . shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (2001).

The Bureau of Customs and Border Protection ("Customs") has detailed regulations, 19 C.F.R. § 4.14 (Apr. 1, 2004), for the assessment and collection of duties under the vessel repair statute. Customs requires the vessel operator to declare and enter all costs associated with foreign shipyard work, whether or not dutiable. Typically, the entry submitted by a Customs Form ("CF") 226 is accompanied with a spreadsheet listing hundreds of line items detailing the specific work and characterizing each individual item as dutiable or not.[3] Each item must be accompanied by an invoice from the shipyard. Sometimes, it takes weeks or even months to obtain these invoices, requiring the vessel operator to obtain extensions of time from Customs to submit such evidence of cost in support of the vessel operator's application for relief. *See* 19 C.F.R. § 4.14 (f) and (i) (Apr. 1, 2004). Needless to say, these regulatory requirements, intended to allow Customs to determine dutiability of the

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[3] For example, all expenditures made at shipyards must be declared and entered on the CF 226, even if subject to a free trade agreement such as the North American Free Trade Agreement ("NAFTA"). 19 C.F.R. § 4.14(a).

specific item of work, impose a tremendous additional burden on U.S.-flag ocean carriers and operators.

When the vessel repair entry is submitted as complete, Customs reviews each line item to determine whether Customs views the specific expense as a dutiable "expense of repair" or as subject to specific statutory duty exemptions. The vessel owner or operator may then disagree with Customs' finding by filing an administrative protest under 19 C.F.R. Part 174 (Apr. 1, 2004); *see also* 19 U.S.C. § 1514(a)(2) (2001) *and* 19 C.F.R. § 4.14(i)(3) (Apr. 1, 2004). If the protest is denied, a summons may be filed with U.S. Court of International Trade as was done with the SEA-LAND PACIFIC. 28 U.S.C. § 1581 (2001).

REASONS FOR GRANTING THE PETITION

In 1994, the Federal Circuit in *Texaco* interpreted the statutory phrase

> 'expenses of repairs' as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, 'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work.

Texaco Marine Services, Inc. v. United States ("Texaco"), 44 F.3d 1539, 1544 (Fed. Cir. 1994). This decision enunciated what has became known as the "but-for" test within the industry and by Customs. The Federal Circuit in *Texaco* found the statute to be "clear" and not "ambiguous" and the language to be "broad and unqualified." *Id.* Yet now, the Federal Circuit, reversing a decision by the U.S. Court of International Trade ("USCIT"), has articulated a different standard, which as a matter of law and common sense clashes with the "but-for" test. Its new "dual purpose" interpretation stretches the statute even farther beyond repair-related expenses. The statute is limited for a reason—to strike a

balance between the interests of U.S. shipyards and U.S.-flag carriers and operators. The Federal Circuit's decision here upsets that balance and harms U.S.-flag carriers.

The decision below is arbitrary and is inconsistent with that court's own decision in *Texaco,* harming *Amici's* companies, which operate in a highly competitive environment. The Federal Circuit's new "interpretation" of the vessel repair statute not only departs from the plain language of the statute but also conflicts with the Federal Circuit's own interpretation just a decade ago in *Texaco*. Further, contrary to the intent of Congress, it allows Customs to arbitrarily impose duties on work done abroad on U.S.-flag vessels.

The industry opposed the expansive view of the statute espoused by the Government in *Texaco*. However, the industry has adjusted to the *Texaco* "but-for" approach. The Federal Circuit now expands the statutory term even farther to impose duties on any expense incurred in a foreign shipyard, whether repair-related or not, by imposing a modified "but-for" test for so-called "dual purpose" or "mixed justification" expenses. The Federal Circuit's decision has in effect blessed Customs' rewrite of the vessel repair statute to impose duties on any item of work done in a foreign shipyard even though the Federal Circuit lacks authority to do so. The statute imposes duties not on all costs incurred in shipyards abroad but only upon "expenses of repairs." That was the apparent reason for the Federal Circuit's original "but-for" test in *Texaco*. The Federal Circuit's novel construction, based upon common law tort doctrine, allows Customs to impose the hefty 50 percent duty where it was not intended by Congress. This harms U.S.-flag carriers. It deprives U.S.-flag carriers and operators of the carefully constructed limitations of the vessel repair duty created by Congress in 19 U.S.C. § 1466 (2001).

Moreover, it is disturbing to our industry that the issues raised by this case will not be further examined in other lower

courts because the Federal Circuit has exclusive appellate jurisdiction of cases involving disputes over customs duties, *see* 28 U.S.C. §§ 1295(a)(5), 1581(a) *and* (b) (2001). As such, the Federal Circuit's adoption of Customs' arbitrary duty assessment cannot be corrected absent a reversal by this Court.

We concur with and adopt by reference herein the legal arguments for review made by Petitioner SL Service.[4] We submit this Brief to illustrate the impact of the Federal Circuit's decision on U.S.-flag ocean carriers.

I. THE INHERENTLY INCONSISTENT INTERPRETATIONS BY THE FEDERAL CIRCUIT IN *TEXACO* AND *SL SERVICE* CREATE CONFUSION IN IMPLEMENTING AND ADMINISTERING THE VESSEL REPAIR STATUTE AND THEREFORE REQUIRE THIS COURT'S INTERVENTION

A. The Federal Circuit's Decision Calls into Question Its Earlier Interpretation of "Expenses of Repairs" in *Texaco*

Prior to the Federal Circuit's decision in *Texaco*, Customs took the position in its administrative rulings that the vessel repair statute imposed duties only on the cost of foreign repairs themselves, *i.e.*, on "expenditures made for foreign materials or for foreign labor employed in making repairs." T.D. 39443, 43 Treas. Dec. Int. Rev. 99, 100 (1923). Expenses incidental to repair work were not considered by Customs to be subject to duty under the statute. *See, e.g.*, *Mount Washington Tanker Co.* v. *United States*, 505 F. Supp. 209, 216 (Ct. Int'l Trade 1980) (cost of transporting workers

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[4] American Shipping Group concurs with and adopts by reference herein only the legal arguments for review made by Petitioner SL Service in Part I of its Petition for a Writ of Certiorari.

to perform repairs not dutiable), *aff'd*, 665 F.2d 340, 345 (C.C.P.A. 1981); *International Navigation Co.* v. *United States*, 148 F. Supp. 448, 455 (Cust. Ct. 1957) (cost of transporting men and materials for repair work not dutiable); *American Viking Corp.* v. *United States*, 150 F. Supp. 746, 752 (Cust. Ct. 1956) (cost of lighting necessary to perform repairs not dutiable). In addition, the cost of dry-docking a ship in a foreign shipyard was long held to be non-dutiable. *United States v. George Hall Coal Co.,* 134 F.1003, 1003 (S.D.N.Y. 1905), *aff'd,* 142 F. 1039, 1039 (2d Cir. 1906).

In *Texaco*, the Federal Circuit interpreted the statutory phrase "expenses of repairs" more broadly as covering expenses incidental to dutiable repairs. Specifically, the *Texaco* court approved the imposition of duties on the costs of protective coverings used in preparation for repairs and of cleaning up after the repairs, reasoning as a matter of plain language "expenses of repairs" should be construed "as covering all expenses . . . which, but for dutiable repair work, would not have been incurred." 44 F.3d at 1541-42. The Federal Circuit in *Texaco* found the statute to be "clear" and not "ambiguous" as well as "broad and unqualified," overruling the *Mount Washington*, *International Navigation*, and *American Viking* cases, *see Texaco* at 1544 *and* 1546-47, but leaving *George Hall Coal* intact, stating that the "but for" test was consistent with the *George Hall Coal* decision covering a dry-docking expense, which it interpreted as "stand[ing] for the proposition that expenses that would have been incurred irrespective of whether or not dutiable repairs are performed are not dutiable as an expense of repairs." *Id.* at 1546.

As a result of *Texaco*, a wide range of expenses previously considered non-dutiable by Customs (such as dry-docking, air, crane, dry-docking charges, electricity, travel/transportation, launch use, lodging, security and staging) were brought within the scope of the statute by utilization of *Texaco's* "but-for" test. *See* Memorandum from Stuart P. Seidel, Assistant Commissioner, U.S. Customs Office of

Regulations & Rulings, to New Orleans Regional Director, Commercial Operations Division (Jan. 18, 1995), *available at* 1995 WL 64779, as clarified by Memorandum from Stuart P. Seidel, Assistant Commissioner, U.S. Customs Office of Regulations & Rulings, to New Orleans Regional Director Commercial Operations Division (March 3, 1995), *available at* 1995 WL 156403.

While acknowledging the applicability of the *Texaco* "but-for" test to dry-docking and related services such as transportation, towing, pilotage, rigging, staging and crane use, Customs at the same time created another category of expense "in circumstances in which a mixed justification for dry docking is present." Jt. App. 100-105. For these "mixed-purpose" expenses, Customs imposed duty on the dry-docking and general services expenses by apportioning duties between the dutiable and non-dutiable work performed during the dry-docking period.[5] This is the method of duty assessment challenged by SL Service as contravening the vessel repair statute and the *Texaco* "but-for" test.

A divided Federal Circuit just a decade later stunned the industry in reversing the decision of the USCIT and ignoring the plain meaning of the statutory phrase "expenses of

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[5] According to the Declaration of Glen E. Vereb, Attorney-Advisor in the Entry Procedures and Carrier Branch, Office of Regulations & Rulings ("OR&R"), "[p]ro rata apportionment works in the following manner. For purposes of explanation, assume an entry has a total value of $1,100,000 covering all expenses, of which $100,000 represents dry-docking and general services. This amount is subtracted from the total amount of the entry leaving $1,000,000. Of this remaining amount, $600,000 represents dutiable expenses of repairs (60% of $1,000,000) and $400,000 represents non-dutiable expenses (40% of $1,000,000). Factoring the 60/40 ratio into the dry-docking and general services charges, apportionment results in $60,000 in dutiable dry-docking and general services costs and $40,000 in non-dutiable dry-docking costs. Thus the total amount of dutiable repairs for this entry is $660,000." Jt. App. 76-78.

repairs" and the *Texaco* "but for" test and approving Customs' novel duty assessment based upon apportionment. The majority below, not expressly overruling *Texaco* or a later case applying *Texaco*, *Sea-Land Service, Inc.* v. *United States*, 239 F.3d 1366 (Fed. Cir. 2001), reasoned that "[t]he precedential force of *Texaco* applies only to single-purpose expenses," finding that if dry-docking has "dual" purposes then Customs is entitled to apportion expenses between nondutiable work and dutiable repairs. Instead of relying on traditional statutory construction, as reflected by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) and its progeny, the Federal Circuit took the unusual approach of using common law tort doctrine as applied to multiple tortfeasors to justify its deviation from the statute and the court's earlier decision in *Texaco*.

Such analysis has no place in interpreting a duty or tax statute enacted to promote certain policy objectives. As noted by Judge Bryson in his dissent, "[i]n the context of the vessel repair statute . . . the question is not whether and how to compensate the victim of a wrong. Congress has determined that a duty of 50 percent on foreign repairs is the appropriate amount to protect the American shipbuilding industry from foreign competition; the question before us is simply whether, in determining how to calculate that 50 percent duty, a particular expense should be attributed to the cost of repairs. And the answer to that question is best given by the formula set forth in *Texaco*: that the expense is not an expense of repair if it 'would have been incurred irrespective of whether or not dutiable repairs were preformed.' 44 F.3d at 1546." App. 11a-12a.

The result of the panel majority disregarding the limits of the statute and its earlier decision in *Texaco* exposes U.S.-flag owners and operators to substantial duty liability for expenses

that would have been incurred whether or not a dutiable repair were performed.[6]

B. The Federal Circuit's Ruling Is Arbitrary

The Federal Circuit itself in *Texaco* found the statute to be clear and unambiguous covering expenses that would not have been incurred but for the repair (regardless of whether they were required by that repair). 44 F.3d at 1546. The majority, however, permitted allocation without causation; *i.e.*, the court sanctioned an accounting approach without requiring any link between the dry-docking and associated expenses and the repairs themselves. In the *SL Service* case, there was no showing by the Government that the specific repair items required dry-docking. *See* Spreadsheet identifying whether the particular item of work required or did not require dry-docking and associated services. Jt. App. 838-852. In fact, in many cases the repairs did not require dry-docking. Under the formulaic approach taken by Customs

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[6] The ruling affects a wide range of expenses in addition to the cost of dry-docking itself. As Customs has noted, in a rulemaking dealing with the vessel repair statute:

> Drydocking is a major, but not isolated, expense in general ship repair operations. Many other associated expenses and services are necessary adjuncts to drydocking and are logically inseparable from the drydocking rule. These include such items as drydock block arrangement, sea water supply (for firefighting equipment), hose hook-up and disconnection charges, fire watch services, the services of a crane for drydocking-related operations, the provision of compressed air, cleaning of the drydock following repairs, among numerous others. These necessary services are costly, are supplied at nearly each drydocking, and had until recently been considered to be classifiable as duty-free.

Foreign Repairs to American Vessels, 66 Fed. Reg. 16,392, 16,393 (Mar. 26, 2001). Now all such expenses are subject to the vessel repair duty, even if the ship was in dry-dock by reason of nondutiable work or mandatory inspections if repairs are performed during the dry-dock period.

wherein repairs, modifications and inspections occur simultaneously the dry-docking and general services expenses would always be subject to duty. This would be the case whether or not the charges would have been incurred irrespective of the occurrence of repair work. Imposition of duties under such circumstances is without basis in law and thus arbitrary on the part of Customs.

U.S.-flag vessel owners and operators regularly place their ships in dry-dock to comply with USCG and ABS mandatory inspections. Because of the substantial costs associated with taking a ship out of service to comply with such legal requirements, the vessel operators/owners arrange for other work during this period where the vessel is out of service. The dry-dock and associated general service expenses are driven by non-dutiable inspections and are incurred irrespective of the repair work. Such expenses cannot be construed as necessarily required "but-for" repairs. Just because the repair is performed during the dry-docking does not mean the repair required dry-docking and related services. Indeed, for the SEA-LAND PACIFIC the repairs in many cases did not require dry-docking at all. Jt. App. 838-852.

In the case of the SEA-LAND PACIFIC, the U.S. Court of International Trade properly found that "only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory inspection and/ or modifications are dutiable under the *Texaco* test." *Am. Ship Mgmt., LLC v. United States*, 162 F.Supp.2d 671, 675 (Ct. Int'l Trade 2001). Thus, if the dry-docking were to extend beyond the period necessary to perform mandatory inspections we would not dispute the imposition of vessel repair duties under the "but-for" test for the additional time because those services were necessitated by the repair work and not driven by the mandatory inspections or other non-dutiable work such as a modification. As such, these charges are repair expenses under the statute and the "but-for" test. That is not the case where the dry-docking is compelled by

mandatory USCG and ABS requirements and the period of dry-docking did not exceed the period of time necessary to perform these mandatory inspections except under the arbitrary and illogical ruling being appealed here.

The statute contemplates that an expense either is or is not a dutiable "expense of repair." Congress did not provide for an "apportionment" of expenses between dutiable and non-dutiable categories or for a partial assessment of duties. The Federal Circuit's approval of Customs' capricious apportionment methodology, as Judge Bryson pointed out, "finds no support in the vessel repair statute." App. 12a (Bryson, J., dissenting). It is noteworthy that Congress has provided for apportionment and partial duty assessment in other tariff laws.[7] In this case, Congress made no provision for partial duty assessment but imposed duties only upon "expenses of repairs." If Congress intended to provide for apportionment under 19 U.S.C. § 1466(a) it would have done so in clear and unambiguous language.

II. THE FEDERAL CIRCUIT'S RULING HARMS THE U.S. MERCHANT FLEET

If allowed to stand unreviewed, the decision below will have serious deleterious effects on the U.S.-flag fleet. Periodic dry-docking is required by USCG regulations and ABS requirements. Shipyard dry-docking and overhaul constitute one of the largest expense items in a cargo vessel's operating budget. Since vessel operators need to have repairs done virtually every time one of their vessels is in dry dock, the duty assessment rule announced by Customs and ap-

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[7] For example, in 19 U.S.C. § 1401a(b)(1)(C) (2001), Congress provides that for "assists," the amount to be added to arrive at "transaction value" is the value "apportioned as appropriate, of any assist." Congress has also provided for partial assessment of duties under subheadings 9802.00.40 and 9802.00.80, Harmonized Tariff Schedule of the United States, which assess "a duty on the value of repairs or alterations" rather than duty on the total value of the article.

proved by the Federal Circuit will have a significant negative financial impact on U.S.-flag operators.

The impact of *Texaco* and now the Federal Circuit's decision in *SL Service* on apportionment represents an ever increasing financial burden on U.S.-flag vessel operators. U.S.-flag operating costs are already significantly higher than those for foreign flag operators.

III. CONCLUSION

The decision below has no basis in the statute but, in a strained effort to support Customs' further imposition of duties, instead resorts to an unconventional analysis based upon common law tort doctrine to expand the parameters of the statute. As such, the decision sanctions an arbitrary ruling by Customs to impose duties on services where none was provided by Congress. The court decision is also inconsistent with the Federal Circuit's own "but-for" interpretation in *Texaco*, thereby likely leading to further confusion in administration of the vessel repair statute. Finally, the decision, if not reviewed, will result in a further onerous financial burden placed only on U.S.-flag vessel operators by their own government, which can only serve to benefit their non-U.S. citizen competitors. For these reasons, the decision of the divided panel should be reviewed by this Court.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 12, 2004

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